Welfare, Pension and Vacation Funds, Blasters, Drillrunners and Miners Union Local No. 29 and their Trustees Louis Sanzo, Amadio A. Petito, Patricia Cahill and Theodore King *and* Joyce Cole *and* Julieta Fernandez *and* Joyce Cole and Julieta Fernandez. Cases 2-CA-16528, 2-CA-16529, 2-CA-16797, and 2-CA-16937

July 8, 1981

DECISION AND ORDER

On January 26, 1981, Administrative Law Judge Howard Edelman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Welfare, Pension and Vacation Funds, Blasters, Drillrunners and Miners Union Local No. 29 and their Trustees Louis Sanzo, Amadio A. Petito, Patricia Cahill, and Theodore King, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1:

"1. Cease and desist from:

"(a) Reducing the job responsibilities of employees, because the employees have engaged in protected concerted activities, by:

"(i) Refusing to allow them to call employees represented by the Union at home to inform them of work opportunities.

"(ii) Refusing to allow them to deal directly with Respondent's accountant or with the bank where Respondent keeps its accounts.

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We agree with the Administrative Law Judge's finding that Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. In so finding, we note the parties stipulated that Respondent Funds annually receive contributions for services rendered in excess of $50,000 from general contractor Schiavone, which has its main offices in New Jersey but performs work in New York for which it annually purchases goods valued in excess of $50,000 directly from suppliers located outside New York. We also note that the Board has previously asserted jurisdiction over Respondent Funds in *Welfare and Pension Funds, Blasters, Drillrunners and Miners Union Local No. 29 and their Trustees Louis Sanzo, Amadio A. Petito, Paul Crowley, and Theodore King*, 251 NLRB 1241 (1980), enfd. in an unpublished opinion, No. 80-4213 (2d Cir. April 7, 1981).

In adopting the Administrative Law Judge's Decision in this case, however, we find it unnecessary to rely upon his finding that Respondent Funds and the Union constitute a single employer. In this regard, we note that the Union was never named as a party in this proceeding.

The Administrative Law Judge has found that Respondent Officials made numerous statements indicating animus toward the Charging Parties' protected concerted activities. Inasmuch as there is such direct evidence of animus, we find it unnecessary to rely upon the inferences drawn by the Administrative Law Judge as to the "natural effect" on Respondent of the Charging Parties' adverse testimony at the workmen's compensation board hearings and of Cole's participation and testimony in a previous Board proceeding or upon the fact that the Union hired Rose Mitchell to perform some of the work previously done by Cole and Fernandez.

[2] We agree with the Administrative Law Judge's conclusion that Respondent failed to establish its defense that the discharges of Cole and Fernandez were motivated by economic considerations. Rather, we conclude that Respondent's asserted economic defense was merely a pretext. Thus, we note that the failure of Lloyds of London to renew Respondent's fiduciary insurance coverage occurred in April 1978, almost 20 months before Respondent discharged Cole and Fernandez; that Respondent attributed the failure to renew at least in part to the supposed conflict of interest caused by Cavalieri holding two positions (Administrator of Respondent Funds and Union Trustee for Respondent Funds) and Cavalieri immediately resigned from his position as Union Trustee on April 26, 1978; that, while Respondent also attributed the failure to renew to the high amount of its administrative expenses, Respondent immediately instructed its accountant on April 26, 1978, to reduce these administrative expenses by changing the books to show various fees charged by outside professional firms (such as auditing fees, actuarial fees, claims review costs, investment adviser fees, legal fees, etc.) as costs falling under accounting categories other than administrative expenses; that without any other changes in its expenses Respondent was able to get similar fiduciary insurance coverage from another insurance company in about May 1978; that on July 1, 1978, Respondent began charging the Union $100 a month for services performed by Cole and Fernandez for the Union to further reduce Respondent's administrative expenses; that no other changes in Respondent's administrative expenses were made or proposed between about September 1978 and June 1979; that the changes made in June 1979 were found by the Administrative Law Judge to be in retaliation against the Charging Parties' protected concerted activities; and that Respondent presented no evidence of any further economic or insurance problems warranting its sudden decision in June 1979 to study the possibility of contracting out the work performed by Cole and Fernandez. In so concluding, however, we find it unnecessary to rely upon the fact that during this period Respondent increased the benefits paid to employees or that the Union hired Mitchell to perform some of the work previously done by Cole and Fernandez.

[3] We have modified the Administrative Law Judge's recommended Order to follow more accurately the actual violations found. We have also modified the Administrative Law Judge's notice to conform to our Order.

For the reasons set forth in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), we find that the broad injunctive order recommended by the Administrative Law Judge is warranted. We note that in this case Respondent has been found to have engaged in numerous violations of Sec. 8(a)(1) and (4), including the discharges of two employees, and that Respondent has previously been found to have violated Sec. 8(a)(1) by discharging an employee. See *Welfare and Pension Funds, Blasters, Drillrunners and Miners Union Local No. 29, supra.*

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

"(iii) Refusing to allow them to distribute pension checks to individuals entitled to receive such checks.

"(iv) Ordering them not to answer the office door or telephone at Respondent's office.

"(v) Refusing to allow them to obtain, from the General Contractors' Association, signatures of its officials on certain documents.

"(vi) Refusing to allow them to fill out pension and welfare claim forms for employees represented by the Union.

"(vii) Refusing to allow them to send letters over their own signatures to employers who are deficient in their welfare and pension contributions.

"(viii) Eliminating their duties with regard to Respondent's petty cash fund.

"(b) Reducing employment benefits and making working conditions more onerous for employees because the employees have engaged in protected concerted activities, by:

"(i) Refusing to furnish them with the key to Respondent's office.

"(ii) Requiring that they take vacations only during the months of July and August.

"(iii) Closing the kitchen facilities at Respondent's office.

"(iv) Revoking and denying paid sick leave benefits.

"(v) Eliminating paid coffeebreaks and paid check-cashing time.

"(c) Denying pay raises promised to employees because the employees have engaged in protected concerted activities.

"(d) Discharging or otherwise discriminating against employees because they have engaged in protected concerted activities.

"(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2(a):

"(a) Offer Joyce Cole and Julieta Fernandez immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make Cole and Fernandez whole for any loss of earnings they may have suffered as a result of the discrimination practiced against them in the manner set forth in 'The Remedy' section of this Decision. In addition, such backpay shall include an annual salary increase of $25 per week as promised to Cole and Fernandez."

3. Substitute the following for paragraphs 2(d) through (k) and reletter the subsequent paragraphs accordingly:

"(d) Restore to Cole and Fernandez the job responsibilities which they previously performed."

4. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT reduce the job responsibilities of employees because they have engaged in protected concerted activities by refusing to allow them to call employees represented by the Blasters, Drillrunners and Miners Union Local No. 29, of the Laborers' International Union of North America, AFL–CIO, herein called the Union, at home to inform them of work opportunities.

WE WILL NOT reduce the job responsibilities of employees because they have engaged in protected concerted activities by refusing to allow them to deal directly with our accountant or with the bank where we keep our accounts.

WE WILL NOT reduce the job responsibilities of employees because they have engaged in protected concerted activities by refusing to allow them to distribute pension checks to individuals entitled to receive such checks.

WE WILL NOT reduce the job responsibilities of employees because they have engaged in protected concerted activities by ordering them not to answer the office door or telephone at our office.

WE WILL NOT reduce the job responsibilities of employees because they have engaged in protected concerted activities by refusing to allow them to obtain from the General Contractors' Association signatures of its officers on certain documents.

WE WILL NOT reduce the job responsibilities of employees because they have engaged in protected concerted activities by refusing to allow them to fill out pension and welfare claim forms for employees represented by the Union.

WE WILL NOT reduce the job responsibilities of employees because they have engaged in protected concerted activities by refusing to allow them to send letters over their own signatures to employers who are deficient in their welfare and pension contributions.

WE WILL NOT reduce the job responsibilities of employees because they have engaged in

protected concerted activities by eliminating their duties regarding our petty cash fund.

WE WILL NOT reduce employment benefits and make working conditions more onerous for employees because they have engaged in protected concerted activities by refusing to furnish them with the key to our office.

WE WILL NOT reduce employment benefits and make working conditions more onerous for employees because they have engaged in protected concerted activities by requiring that they take vacation only during the months of July and August.

WE WILL NOT reduce employment benefits and make working conditions more onerous for employees because they have engaged in protected concerted activities by closing the kitchen facilities of our office.

WE WILL NOT reduce employment benefits and make working conditions more onerous for employees because they have engaged in protected concerted activities by revoking and denying paid sick leave benefits.

WE WILL NOT reduce employment benefits and make working conditions more onerous for employees because they have engaged in protected concerted activities by eliminating paid coffeebreaks and paid check-cashing time.

WE WILL NOT deny pay raises promised to employees because the employees have engaged in protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees for engaging in protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer Joyce Cole and Julieta Fernandez immediate and full reinstatment to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make Cole and Fernandez whole for any loss of earnings they may have suffered as a result of our unlawful discrimination practiced against them, in accordance with the Order of the National Labor Relations Board. In addition, such backpay shall include an annual salary increase of $25 per week as promised to Cole and Fernandez.

WE WILL pay to Cole one hour sick pay in accordance with the Order of the National Labor Relations Board.

WE WILL pay to Fernandez one day's sick pay in accordance with the Order of the National Labor Relations Board.

WE WILL restore to Cole and Fernandez the job responsibilities which they previously performed.

WE WILL furnish to Cole and Fernandez keys to our office.

WE WILL restore the vacation policy followed with respect to Cole and Fernandez prior to June 1979.

WE WILL reopen our kitchen facilities and permit Cole and Fernandez the use thereof.

WE WILL reinstate the paid sick leave policy in effect prior to about June 20, 1979.

WE WILL reinstate paid coffeebreaks and paid check-cashing time procedures previously enjoyed by Cole and Fernandez prior to June 20, 1979.

WELFARE, PENSION AND VACATION FUNDS, BLASTERS, DRILLRUNNERS AND MINERS UNION LOCAL NO. 29 AND THEIR TRUSTEES LOUIS SANZO, AMADIO A. PETITO, PATRICIA CAHILL AND THEODORE KING

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge: This case[1] was heard before me on February 6 and 7, March 3-7 and 17, 1980, in New York, New York. On August 2, 1979, complaint issued in Cases 2-CA-16528 and 2-CA-16529 on charges filed by Joyce Cole and Julieta Fernandez, individuals, herein called Cole and Fernandez, respectively. On December 14, 1979, complaint issued in Case 2-CA-16797 based on a charge filed by Cole and Fernandez on October 4, 1979. On December 28, 1979, complaint issued in Case 2-CA-16937 based on a charge filed by Cole and Fernandez on December 3, 1979. All of the above complaints were consolidated for hearing herein.

The complaints alleged, *inter alia*, that Welfare, Pension and Vacation Funds, Blasters, Drill Runners and Miners Union, Local No. 29, and their Trustees, Louis Sanzo, Amadio A. Petito, Patricia Cahill and Theodore King, herein called Respondent, violated Section 8(a)(1) and (4) of the National Labor Relations Act, as amended, herein called the Act. The thrust of the complaint alleges that Respondent reduced the job responsibilities, reduced employment benefits, and imposed more onerous conditions of employment on Cole and Fernandez, and thereafter discharged Cole and Fernandez, all of the above in violation of Section 8(a)(1) and (4) of the Act.

[1] The caption of the complaint was amended at the hearing to insert the name Patricia Cahill as trustee for Paul Krowley, originally alleged as trustee in the complaint.

Briefs were filed by counsel for the General Counsel and counsel for Respondent. Upon consideration of the entire record, the briefs, and my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent herein is a trust fund which was created pursuant to collective-bargaining agreements between the Blasters, Drillrunners and Miners Union Local No. 29, the Union herein, and employer-members of the General Contractors Association of New York, Inc., and various other independent employers herein collectively called the Employers, and pursuant to an agreement of declaration of trusts executed by and between the Union and the Employers herein. Respondent receives monetary contributions from the Employers above pursuant to the terms of their collective-bargaining agreements with the Union, and administers a vacation, pension, and welfare fund which provides benefits to members of the Union employed by the contributing Employers. At all times material herein, Respondent has operated and administered such funds from an office located at 238 East 75th Street in the city and State of New York.

Respondent annually in the course and conduct of its operations provides services in the form of pension, welfare, and vacation benefits to employees employed by the Employers covered by collective-bargaining agreements with the Union which services are valued in excess of $50,000 and are rendered to enterprises within the State of New York, which enterprises are engaged in the nonretail sale of goods and materials, and either annually purchase goods and materials valued in excess of $50,000 which are shipped to the enterprises within the State of New York directly from points outside the State of New York, or annually sell and ship goods and materials valued in excess of $50,000 from the State of New York directly to points outside New York.[2]

A. *Relationship Between Respondent and the Union*

Both Respondent and the Union maintain a single office located at 238 East 75th Street, New York, New York. The Union is the lessor of said premises, subletting space to each of the funds (pension, welfare, and vacation funds) comprising Respondent. At all times material herein, the union trustees of Respondent have been Louis Sanzo and Amadio A. Petito, the Employer trustees have been Theodore King and Patricia Cahill. Sanzo, in addition to being trustee for Respondent, is president of the Union. Sam Cavalieri is employed by Respondent as administrator and is an alternate official for the Union. Additionally, Respondent employed Cole and Fernandez as bookkeepers until November 30, 1979. In December 1978, the Union employed Rose Mitchell as a clerical. At all times material there has been total interchange of personnel performing work for Respondent and the Union. In other words, Sanzo, Petito, Cavalieri, Cole, Fernandez, and Mitchell performed all office clerical and bookkeeping functions for Respondent and the Union. Although Cole and Fernandez, throughout the course of their employment, which began in December 1976 and January 1974, respectively, performed work for Respondent and the Union, Respondent was not reimbursed by the Union for their work until May 30, 1979. From that date and thereafter, the Union reimbursed Respondent $50 per month for each employee. Although Rose Mitchell performed work for Respondent since her employ by the Union in December 1978, there is no evidence that Respondent reimbursed the Union for such work performed.

Sanzo and Petito are in overall charge of the union office. Additionally, as Respondent's trustees they are in overall charge of Respondent's office. Sanzo and Petito supervise all office employees employed by Respondent and the Union. Directly responsible to Sanzo and Petito is Cavalieri, whose duties also include supervising Cole, Fernandez, and Mitchell. Cavalieri also performs work on behalf of the Union as well as the functions of administrator on behalf of Respondent.

B. *Work of Cole and Fernandez*

Fernandez commenced employment with Respondent in January 1974 as a bookkeeper and general office helper. Cole commenced employment with Respondent in December 1976 in the same capacity. They were paid two separate checks each pay period, one from the pension fund and one from the welfare fund for 50 percent each of their total salary. Both employees performed essentially all bookkeeping, recordkeeping, and office clerical functions for Respondent's funds (pension, welfare, and vacation funds) and the Union.

Cole's duties for the Union included receiving dues from union members when they came to the office to remit such dues, receiving job orders from Employers, and notifying employees of such jobs. She paid union bills and made out bank deposits, prepared financial statements and W-2 forms, and answered telephone calls. Cole's work for the vacation fund included preparation of accounts receivable and payable and all other bookkeeping functions. She issued vacation stamps when they became redeemable each June and December, and prepared and paid all vacation fund bills, and prepared W-2 forms. For the pension fund, Cole prepared pension checks, performed all bookkeeping functions, paid bills, and prepared W-2 forms. For the welfare fund she prepared all claim checks, performed all bookkeeping functions, prepared correspondence related to the welfare fund, and prepared W-2 forms.

Fernandez' duties for the Union included receiving and recording membership dues, answering telephone calls, preparing union correspondence, handling petty cash, and performing general bookkeeping services for the Union. Her duties with respect to the vacation fund included the issuance of vacation stamps in June and December of each year, performing general bookkeeping functions, answering inquiries from members and from contractors, and handling petty cash. Her duties with re-

[2] Respondent amended its answer during the hearing and admitted par. 2, subpars. a through d. Additionally Respondent admits that it is a self-insured fund and provides annually the services described above which are valued in excess of $50,000.

spect to the pension fund included recording and computing Employer contributions to the fund, making bank deposits, performing general bookkeeping functions, handling petty cash, and answering inquiries whether by telephone or otherwise. Her duties for the welfare fund included bookkeeping functions, bank deposits, typing correspondence, and recording and computing Employer contributions to the fund. In addition, she handled petty cash.

Until December 7, 1978, Cole and Fernandez were the only nonsupervisory employees working in the office. In December 1978, Rose Mitchell was hired and placed on the union payroll.[3]

C. *The Concerted Activities of Cole and Fernandez*

In May 1978, Mario Montouro, at that time secretary-treasurer of the Union and assistant administrator of Respondent, sustained an injury in Respondent's office. As a result of such accidental injury he filed a claim with the Workmen's Compensation Board. Subsequently, he was discharged from his position with Respondent and with the Union. Following his discharge Montouro filed a complaint with the Workmen's Compensation Board alleging that he was discharged because he filed a workmen's compensation claim.

A hearing was scheduled to be held in connection with Montouro's complaint before the Workmen's Compensation Board on October 4, 1978. Both Cole and Fernandez received subpenas to testify on behalf of Montouro at the October 4 hearing. Sanzo and Petito were aware that Cole and Fernandez had received subpenas to testify at this hearing because Cole had given Sanzo a copy of her subpena.

Cole and Fernandez testified that on October 3, 1 day prior to the scheduled workmen's compensation hearing, they were informed by Sanzo that the hearing had been postponed. Sanzo informed them that they could confirm such cancellation by telephoning Respondent's attorney. Thereafter, Cole and Fernandez telephoned the Workmen's Compensation Board and were informed that the hearing had not been canceled. On the morning of October 4, Cole and Fernandez advised Sanzo, Petito, and Cavalieri that they had contacted the Workmen's Compensation Board and were informed that the hearing would take place as scheduled, and that they intended to attend the hearing and testify. According to both Cole and Fernandez, a long and heated discussion followed in which Petito and Sanzo urged Cole and Fernandez not to attend the hearing. Both Petito and Sanzo expressed displeasure at the two women for not taking Sanzo's word about the cancellation notice they had received. During this discussion Petito stated to Cole that when the time came he would get rid of her. Fernandez then asked Petito if he were saying he was going to fire them. According to Fernandez, Petito stated, "Yes, I'm going to get rid of you. I'm going to get rid of you when the time comes." According to Cole and Fernandez, Sanzo followed up Petito's statement by stating that Petito's threat also applied to Fernandez.

[3] Mithcell's job duties are discussed in detail below.

Sanzo and Petito testified that, on October 4, they received a telephone call from their attorney informing them that the workmen's compensation hearing scheduled for October 4 was being adjourned. Following this telephone call, Sanzo advised Cole and Fernandez that there was no need for them to go to the October 4 hearing because it had been canceled. According to Sanzo, Cole informed him she had a subpena and would check it out. Sanzo asked Cole whether she thought his attorney would lie. Both Sanzo and Petito deny that a long and heated discussion ensued, they deny that they tried to talk them out of attending the hearing and deny the threats of discharge attributed to them by Cole and Fernandez. Cavalieri also denies the threats alleged by Cole and Fernandez.

I credit the testimony of Cole and Fernandez.[4]

The workmen's compensation hearing concerning Montouro's discharge took place on October 4 as scheduled. During the October 4 hearing Cole testified in substance that, during a conversation with Sanzo and Petito, both Sanzo and Petito informed her that "[t]hey did not want him (Montouro) back in the office because he had filed a compensation case and that [sic] was going to force him to resign his position as secretary-treasurer for the Union and assistant administrator for the Pension and Welfare Funds." Cole also testified that in a discussion with Sanzo and Petito that morning, October 4, prior to the workmen's compensation hearing, she had been informed by Sanzo and Petito that the hearing had been canceled and that Sanzo and Petito harassed her in an attempt to prevent her testifying and had threatened her with discharge. The hearing was adjourned to November 15.

On November 15, the workmen's compensation hearing resumed, Cole testified that at the Workmen's Compensation Board, prior to the hearing, Sanzo in the pres-

[4] I find both Cole and Fernandez to be generally credible witnesses. Throughout the course of their testimony, both Cole and Fernandez were responsive to questions put to them on both direct and cross-examination. Moreover, each witness displayed excellent recall as to the events to which they gave testimony and were able to testify in great detail as to these events. Further I was impressed by their demeanor on both cross- and direct examination. Their answers whether on direct or cross-examination were responsive and forthright. In connection with their testimony concerning the October 4 conversation with Sanzo and Petito, I find the details and content of their testimony, which was mutually corroborative, was not the type of testimony that is easily fabricated. The credibility of Cole and Fernandez as to their conversation with Sanzo and Petito is further enhanced by the nature of their eventual testimony at the workmen's compensation hearing which testimony amounted to virtual admissions of guilt on Respondent's part (described below). Knowing the extent of what their testimony would be, it is understandable why Sanzo and Petito would be reluctant to have Cole and Fernandez appear and testify at the hearing and why they would be angry and threaten to discharge them, when they refused to accept Sanzo's explanation that the hearing had been canceled. Further, the hearing did take place on October 4, as scheduled, contrary to the assertions of Sanzo and Petito. Neither Sanzo, Petito, nor any other Respondent's witness furnished any explanation as to why they had been erroneously informed by their attorney of the hearing's cancellation. Additionally, I find Sanzo, Petito, and Cavalieri not to be credible witnesses. Both Sanzo and Petito throughout the course of cross-examination were evasive and argumentative. Additionally, Sanzo, Petito, and Cavalieri gave various contradictory testimony on key issues as well as unbelievable testimony on other key issues. The credibility of these individuals in this regard is discussed in far more detail below.

ence of Petito and Fernandez criticized her testimony during the hearing on October 4, and asked her to testify at this hearing as to the real reason for Montouro's discharge. Fernandez testified that during this conversation Sanzo denied telling Cole that Montouro was fired because he filed a charge with the Workmen's Compensation Board. Fernandez informed Sanzo at this time that she had indeed heard him make such statement to Cole.

Sanzo testified that he did not remember this specific conversation, but denied making the statements attributed to him by Cole and Fernandez.

I credit the testimony of Cole and Fernandez.[5]

During the course of the hearing on November 15, Fernandez testified. The thrust of her testimony was that she overheard Sanzo and Petito tell Cole that Montouro would not be permitted to return to work because he had filed a workmen's compensation claim. She also testified that on October 4, prior to the initial hearing, Sanzo and Petito were very angry at her and Cole for contacting the Workmen's Compensation Board on October 4 to ascertain whether the hearing had in fact been canceled.

On September 29, 1978, Montouro filed a charge with the National Labor Relations Board in Region 2 alleging his unlawful termination as Respondent's assistant administrator. In connection with the investigation of this charge Cole provided the Board agent investigating the charge with an affidavit dated October 24, 1978. On October 25, 1978, Cole informed Sanzo that she had supplied the Board agent investigating Montouro's unfair labor practice charge with an affidavit concerning the events surrounding his discharge.

A complaint was ultimately issued on Montouro's charge. The complaint alleged that Respondent discharged Montouro for engaging in protected and concerted activities in violation of Section 8(a)(1) of the Act. A hearing was held in connection with this complaint on May 14, 1979. Cole was one of two witnesses called by the General Counsel in support of Montouro's charge. The thrust of Cole's testimony was to corroborate Montouro's testimony that he had complained to Sanzo and Cavalieri about various contractors in the trade violating their collective-bargaining agreements with the Union and that employee claims were not being properly processed. Cole additionally testified as to a May 1, 1978, conversation with Sanzo concerning upcoming union nominations scheduled for May 4, 1978, wherein Sanzo described to her how he intended to rig the nominations for union office. Cole further testified that, following the nomination, Sanzo had informed her that he had successfully prevented Montouro and another union member associated with Montouro, Charles Smith, from being nominated and that he had to get Montouro out of office because he was a troublemaker and had filed for workmen's compensation and that he could not let the "Niggers (Charles Smith is black) take over the Union." Additionally, Cole testified that she heard Sanzo request Montouro's resignation and that Montouro refused to sign a resignation letter submitted to him by Sanzo. This latter testimony by Cole clearly controverted Sanzo's testimony at the hearing that Montouro had voluntarily resigned his employment.[6]

D. *Change in Work Relationship—Respondent's Animus*

It is undisputed that prior to the workmen's compensation hearing on October 4, 1978, Cole and Fernandez enjoyed a friendly, informal, and warm relationship with Sanzo and Cavalieri (Petito at this time was not regularly employed in the office). In this regard, Cole and Fernandez would frequently take their coffeebreak and lunch hour with Cavalieri and Sanzo, Sanzo frequently preparing and serving meals. Additionally, Sanzo arranged a birthday party for Cole, attended by various members of the Union's executive board. In addition, Cavalieri would on occasion drive Cole and Fernandez to their homes from work and occasionally escorted Cole on personal errands. Cole and Fernandez were given considerable leeway in connection with their starting time. They were allowed to take time off without loss of pay to handle personal errands and to cash their paychecks.

It is also undisputed that following Cole's and Fernandez' testimony at the workmen's compensation hearing, the excellent work relationship described above deteriorated. Cole testified that during the period following the workmen's compensation and National Labor Relations Board hearings, Cavalieri and Sanzo stopped talking to her and generally communicated with her and Fernandez through written notes and that they responded in kind. Fernandez corroborates Cole's testimony in this regard. Rose Mitchell testified that upon her hire in December 1978 she observed there was considerable tension in the office among Sanzo, Petito, Cavalieri, Cole, and Fernandez. Cavalieri concedes the relationship began to change after the workmen's compensation case but testified that it was Cole and Fernandez who stopped speaking to him and began communicating with written notes. Petito admits that, following the hearing, he did not want to speak to Cole and kept conversations with her to a minimum.

E. *The Hiring of Rose Mitchell*

Rose Mitchell was first employed by the Union as a receptionist on December 4, 1978. Her salary was $200 per week. Mitchell's work in the office consisted essentially of answering telephone calls and responding to the door buzzer, accepting and recording dues from union members, mailing out notices of union meetings, and at times assisting with the redemption of vacation stamps. Although her duties encompassed work for Respondent and the Union, she was on the Union's payroll only. Re-

[5] My credibility resolution is based on my favorable impression of Cole and Fernandez as credible witnesses described above and on my unfavorable impression of Sanzo as a witness described above and below.

[6] The Administrative Law Judge in his Decision in this case which issued on December 31, 1979, concluded that Respondent had discharged Montouro in violation of the Act as alleged. He described Respondent's defense that Montouro had voluntarily resigned as "strained, flimsy and artificially contrived." In reaching his conclusion, he gave considerable weight to Cole's testimony. *Welfare and Pension Funds, Blasters, Drillrunners and Miners Union, Local No. 29, and their Trustees, Louis Sanzo, Amadio Petito, Paul Krowley and Theodore King*, JD-864-79. This Decision is presently pending before the Board.

spondent did not reimburse the Union for any of her services.

Sanzo concedes that prior to the hiring of Mitchell, Cole, Fernandez, and other Respondent and union officials in the office performed those functions presently performed by Mitchell. When Sanzo was questioned as to why it was necessary to hire Mitchell in view of the fact that Cole and Fernandez were at the time of her hire performing the work performed by Mitchell, he replied nonresponsively, "She was hired by the Union not by the Pension and Welfare."

Mitchell testified that answering the phones and her other duties kept her busy throughout the day. Cole and Fernandez testified that Mitchell's duties kept her busy about 1 hour a day and that most of her workday she spent reading.

Petito testified that Rose Mitchell was hired so that he could spend more time in the field.

The entire membership of the Union at the time of the hearing was less than 400 members.

F. *Allegations and Innuendos*

As of January 1979, Respondent was under investigation by several government agencies concerning various alleged irregularities in connection with the funds administered by Respondent. Bernard Edelstein, an accountant employed by Walter Hirsch, who served as Respondent's accountant, testified that, in January 1979 when he first commenced an audit of Respondent, Walter Hirsch informed him of ongoing investigations by various government agencies and instructed him, "When you are going in to do the audit be careful of doing every required auditing step. Don't make any . . . don't leave any steps undone because they are under investigation."

On April 20 and 21, the New York Daily News printed two articles concerning the alleged criminal activities of Sanzo and Cavalieri. The Daily News articles concerned an investigation pending before the grand jury in connection with alleged unlawful payoffs by building contractors to the Union. Specifically mentioned as being under investigation in the article were Sam Cavalieri, Jr., described as administrator of Respondent's funds, and Louis Sanzo, described as president of the Union.

Cavalieri testified that in April 1979, and thereafter following the publication of the Daily News articles described above, Cole told him on a number of occasions that "[t]he Department of Labor and the U.S. Justice Department had told her that he, Cavalieri, was going to jail for embezzlement."[7] Mitchell confirmed that she had heard Cole tell Cavalieri that he was going to jail. Edelstein testified that sometime in July or August 1979 while conducting an audit of Respondent's office he heard Cole yell at Cavalieri, "You're going to jail like the rest of them."

Cole denied that she ever told Cavalieri that he would go to jail.

I find that Cole did make the statements concerning Cavalieri going to jail as described above.[8]

There is no evidence, however, that Cole was reprimanded by Respondent's officials for these statements. Significantly, there is no evidence that Fernandez made any similar statements.

Walter Hirsch testified that he extended the scope of his audit at Respondent because of the allegations and innuendos cast upon the trustees by Cole described above. Hirsch further testified that he reported to the trustees the need to extend his audit because of the allegations of Cole at a special trustee meeting convened on June 1, 1979. However, Hirsch also testified that, prior to the allegations of Cole which did not take place until late April 1979, he was aware of the ongoing investigations of Respondent and that government agents had taken physical possession of certain of Respondent's books. Hirsch later admitted that these government investigations impelled him to extend his audit.

G. *Discriminatory Changes in the Working Conditions of Cole and Fernandez*

1. Cole not allowed to call employees about job opportunities

Cole testified that, in connection with her duties concerning the Union, there were occasions when she was required to telephone union members at their homes and advise them of job openings. Cole further testified that, sometime in December 1978, Sanzo and Petito informed her that she was no longer to make such telephone calls and that in the future such phone calls would be made by Mitchell. She was not informed of the reason for this change. Sanzo and Petito denied informing Cole that she was no longer to telephone union members concerning work opportunities. I credit Cole.[9]

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[7] Cole had been subpenaed and had testified on several occasions before the grand jury in connection with the investigation described by the Daily News above.

[8] Although I found Cole to be generally a credible witness, there is no question that during this particular period there was tremendous hostility between Cole and Fernandez on one side and Respondent officials on the other side. I make my finding in view of the testimony of Mitchell and particularly Edelstein, a neutral witness. Edelstein is neither an employee of Respondent nor directly employed by Respondent. Moreover, given the hostility that existed at the time, and the state of the government investigations, I find Cole's remarks to be consistent with such hostility and investigations.

[9] For the reasons set forth above, I found Cole to be a generally credible witness. My impression of Sanzo and Petito is that neither individual is a credible witness. In connection with Sanzo, I found his testimony to be evasive, argumentative, and often contradictory. An example of evasive testimony occurred when I asked Sanzo whether Cole and Fernandez performed work for the Union. Sanzo's initial response was, "They helped out." When pressed further, Sanzo ultimately conceded that in fact Cole and Fernandez performed all bookkeeping functions for the Union. Additionally, when Sanzo was questioned as to whether Cole and Fernandez wrote letters and performed typing for the Union, his initial response was, "Some letters yes." After intense and persistent questioning, Sanzo ultimately conceded that Cole and Fernandez typed most of the letters for the Union. In addition, Sanzo was at times argumentative on the witness stand. An example of such conduct occurred in connection with introduction of G.C. Exhs. 19 and 20, The Daily News articles concerning investigation by government agencies into the activities of Sanzo and Cavalieri. During a discussion by the General Counsel, counsel for Respondent, and me, as to the relevancy of the documents, Sanzo engaged in repeated outbursts concerning the accuracy of the newspaper articles. He was cautioned by me to cease such outbursts as they might

Continued

2. Cole and Fernandez were not allowed to deal directly with Respondent's accounts or banks

Cole and Fernandez testified that their normal work functions for Respondent included contacting accountants from time to time to obtain various information concerning bookkeeping matters and also contacting banks with whom Respondent had accounts. Additionally, Fernandez made actual deposits in such banks. According to the testimony of Cole and Fernandez, Cavalieri instructed them sometime during the end of 1978 or beginning of 1979 that they were no longer to contact the accountants, or to deal in any way with the banks. Cavalieri gave no reason for this change. Cavalieri and Petito denied reducing Cole's and Fernandez' responsibilities in this connection.

I credit the testimony of Cole and Fernandez.[10]

3. Cole and Fernandez no longer allowed to distribute pension checks

Both Cole and Fernandez testified that their duties for Respondent included preparing and mailing or handing to pensioners, who came to the office, pension checks. Cole testified that, shortly after Mitchell was hired in December of 1978, Cavalieri told her that from now on she was no longer to mail or hand out such checks, rather the checks were to be placed on his desk. Fernandez testified that, sometime in May, Cavalieri instructed her to place such checks on his desk. No explanation was given to either Cole or Fernandez concerning this change although Cole asked Cavalieri why such change had taken place. Thereafter, such checks were distributed by either Cavalieri or Mitchell.

Cavalieri denied that he changed the procedure relating to the distribution of pension checks although he concedes such change took place. Rather, Cavalieri testified that the change resulted one day in July 1979 when Fernandez "handed me the checks and said here, from now on you hand them to the pensioners."

I credit the testimony of Cole and Fernandez.[11]

4. Cole and Fernandez not allowed to answer door buzzer or office telephone

Both Cole and Fernandez testified that, shortly after Rose Mitchell was hired in December 1978, they were instructed by Petito, Sanzo, and Cavalieri that they were no longer to answer the office telephone or handle the door buzzer.

Sanzo, Petito, and Cavalieri denied issuing such instructions to Cole and Fernandez. For the reasons set forth above, I credit the testimony of Cole and Fernandez. Moreover, Cole's and Fernandez' testimony would be consistent with the hiring of Rose Mitchell whose primary job function appeared to be that of answering the office telephone and handling the door buzzer.

5. Fernandez not allowed to obtain signatures from the General Contractors Association

Fernandez testified that, two to three times a week, she would make an appointment and visit the office of the General Contractors Association in order to obtain signatures from Employer trustees on Respondent's documents. Fernandez testified that, sometime in May 1979, Cavalieri instructed her that she would no longer perform this function. He stated no reason for this change. Thereafter, Cavalieri obtained the required signatures. Sanzo, Petito, and Cavalieri testified that the change in procedure was made at the direction of King, whose signature was required and whose office was located at the General Contractors Association. King's testimony however flatly contradicts the testimony of Sanzo, Petito, and Cavalieri. King testified that the decision to change

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have a adverse affect on his credibility. Another example of argumentative conduct occurred in the General Counsel's cross-examination when the General Counsel questioned Sanzo as to who would perform the bookkeeping functions for the Union after Cole and Fernandez were replaced. Sanzo's response to this question was, "We are not talking about the Union. They [Cole and Fernandez] were employed by Pension and Welfare Funds." Sanzo was again cautioned by me to answer the question put to him by the General Counsel. On yet another occasion when the General Counsel questioned Sanzo as to who was performing bookkeeping operations for the Union following the discharge of Cole and Fernandez, Sanzo testified that Petito was performing such bookkeeping functions. When the General Counsel pressed Sanzo as to whether Petito was actually performing such bookkeeping functions, Sanzo responded, "He [Petito] is secretary treasurer. You should ask him that question." Sanzo also gave contradictory testimony in connection with material issues in this case. In this connection, Sanzo initially testified that, following the discharge of Cole and Fernandez, Petito performed bookkeeping functions for the Union. When pressed by the General Counsel on cross-examination as to whether Tolley performed bookkeeping functions for the Union, Sanzo initially testified that Tolley performed no work for the Union. However, after pressing cross-examination by the General Counsel, Sanzo conceded that Tolley did indeed perform *all bookkeeping functions for the Union.*

I also found Petito's testimony to be generally vague and evasive, and often contradictory. In this connection, Petito initially testified that the decision to subcontract out to Tolley the work being performed by Cole and Fernandez was motivated entirely by a decision to save money. However, Sol Taber, vice president of Tolley, Theodore King, Employer trustee of Respondent, conceded that one of the reasons for the subcontract was the allegations and innuendos attributed by Respondent to Cole and Fernandez. On another occasion, Petito testified that Fernandez was relieved of her job function of contacting contractors for their signatures because Employer trustee King wanted to deal with Cavalieri directly. However, King's testimony directly contradicts that of Petito and Cavalieri. King testified the decision to change the procedure was made by Cavalieri entirely and that he played no role in it whatever. Additionally, Petito testified that Respondent's sick leave policy, described below, was changed because of a suggestion by King. However, in prior testimony in a Federal District Court matter (78 Civil 4619), Petito testified that the sick leave policy was changed because of the allegations and innuendos attributed to Cole and Fernandez.

[10] My credibility resolutions in connection with Cole, Fernandez, and Petito are set forth and discussed in detail above. My impression of Cavalieri's testimony was that it was often vague and evasive and at times contradictory as to material issues. In this connection Cavalieri testified that he could not recall whether raises for Cole and Fernandez were discussed at a particular trustee meeting. Respondent trustee King testified that not only were raises for Cole and Fernandez discussed at this trustee meeting, but that Cavalieri opposed such raises because of the allegations and innuendos attributed to Cole and Fernandez. Additionally, Cavalieri testified in great detail that pursuant to a suggestion by King it was decided that Fernandez was no longer to contact the General Contractors Association. However, King's testimony directly contradicts that of Cavalieri. In this respect, King testified that the decision was made entirely by Cavalieri and that he (King) played no role in such decision.

[11] In addition to my findings concerning Cavalieri's credibility described above, I do not find Cavalieri's assertion that it was Fernandez who in effect told him that she would no longer distribute these checks to be believable. After all, Cavalieri was Fernandez' supervisor. I find it highly unlikely that Cavalieri would permit Fernandez to dictate to him what work she will perform. Such testimony further reflects my overall evaluation that Cavalieri is not a credible witness.

the procedure was made by Cavalieri and that he played no role whatever in such decision. I credit the testimony of Fernandez and King.[12]

6. Cole not allowed to assist claimants in preparation of claim forms

Cole testified that part of her duties included assisting claimants filling out required claim forms. According to Cole, sometime in June 1979, Cavalieri instructed her that she was no longer to perform this function and that henceforth claimants would receive assistance only from Cavalieri.

Cavalieri denied that he told Cole or Fernandez not to give out or assist in the preparation of claim forms.

For the reasons described above, I credit the testimony of Cole.

7. Fernandez not allowed to send letters to Employers over her signature

Fernandez testified that, in connection with her duties relating to Respondent's pension and welfare funds, it was at times necessary for her to write letters over her signature advising Employers of discrepancies in their fund contributions. Fernandez testified that, sometime in August 1979, Cavalieri instructed her that in the future all such letters were to go out over his signature only. He gave no reason for this change. Thereafter, all such letters were signed by Cavalieri.

8. Cole and Fernandez relieved of their duties in handling petty cash

Both Fernandez and Cole distributed Respondent's petty cash funds. Cole and Fernandez testified that, sometime in June 1979, Cavalieri advised them that henceforth he would take care of all petty cash disbursements. Cavalieri explained to them that the trustees had directed this change.

Cavalieri testified that he made the change as a result of "innuendos that petty cash was being spent erroneously or it didn't appear to be what it was." Sanzo testified that Fernandez and Cole were relieved of petty cash responsibility as part of the "tightening up" process. Sanzo conceded that there had never been any discrepancy with petty cash attributable to Cole or Fernandez.

Petito testified that the "tightening up" process took place as a result of the "allegations and innuendos" by Cole, as a result of Sanzo's indictment, and as a result of the workmen's compensation charge and the National Labor Relations Board charges.

King credibly admits the so-called "tightening up" process came about as a result of the "charges, countercharges, the NLRB cases."

[12] King impressed me generally as a credible witness. His testimony was responsive, generally rather blunt and to the point. Moreover, King as Employer trustee of Respondent is an agent. Further, being an Employer trustee, his testimony tends to be more reliable than Sanzo, Petito, or Cavalieri. As King testified in his executive position with the General Contractors Association, he is an employer trustee for over 30 independent funds similar to that of Respondent.

9. Cole and Fernandez not given a key to the front office door

Both Cole and Fernandez received keys to the front door when hired. Sometime in June 1979, Respondent changed the lock of the front door. New keys were issued to all office personnel except for Cole and Fernandez. Several days after the issuance of such keys, Cole asked Petito if she and Fernandez would be given keys and Petito responded they would not.

Petito testified that Cole and Fernandez were not given office keys because of "charges and innuendos were being slung around" by Cole and Fernandez.[13]

10. Denial of pay raise to Cole and Fernandez

Fernandez was employed in 1974 at a salary of $175 per week. She received a pay raise each year except in 1975. Her last pay raise occurred in March 1978, at which time her salary was increased from $250 to $275 a week. Cole's starting salary in December of 1976 was $225. She received a $25 increase to $250 a week in 1977 and another $25 raise in 1978.

Cole and Fernandez testified that sometime in early 1978 in a discussion with Sanzo, Cavalieri, and Montouro, they agreed that if Cole and Fernandez were willing to perform all bookkeeping and office work required for running Respondent office and the Union, without assistance from other clericals, they would receive yearly wage increases of $25. Cole and Fernandez agreed to this. Fernandez testified that, although Sanzo indicated that such raises would have to be approved by the board of trustees, this was no problem since he was the chairman of the board and whatever he wanted to do he could do it.

Montouro's testimony fully corroborated the testimony of Cole and Fernandez with respect to the promise of yearly increases.

Sanzo testified that he told Cole and Fernandez that if there were raises to be had he would do what he could to see that they got them. Sanzo denied making any commitments to future raises. Cavalieri although not specifically denying the testimony of Cole and Fernandez testified that it was his recollection that Respondent agreed that "they would look at the work performance and to evaluate what people have been doing." For the reasons set forth above, I credit the testimony of Cole and Fernandez. Moreover, the testimony of Cole and Fernandez was corroborated by that of Montouro.

Fernandez and Cole testified that, sometime in June 1979, Cole spoke to Petito about a pay raise. Petito said that he would discuss the matter with the trustees. A short time later Petito in the presence of Sanzo reported to Cole that the trustees were not giving raises. Sanzo laughed.

Sanzo testified that he recommended at a trustee meeting, to the trustees, that raises be given to Cole and Fernandez. However, his recommendation was turned down by the trustees. Petito corroborated Sanzo's testimony. King testified that the question of raises for Cole and

[13] The failure to provide Cole and Fernandez with keys was not alleged by the General Counsel as an unfair labor practice.

Fernandez was brought up at a trustee meeting and that Cavalieri opposed such raises because of the allegations and innuendos attributed to Cole and Fernandez. I credit King.[14]

During the year 1979, Cavalieri, the law firm of Corcoran and Brady, Respondent's attorneys, Walter Hirsch, Respondent's accountant, and Tolley Associates, Respondent's actuaries, all received substantial pay raises for their services. Moreover, during 1979, pension and welfare benefits were increased.

11. Respondent imposed a more restrictive vacation policy on Cole and Fernandez

Prior to June 1979, no restrictions were imposed upon Cole or Fernandez as to when they could take their annual vacation. The usual procedure was that the employee would simply inform Cavalieri or Sanzo as to when she wanted to take a vacation and they would routinely give their approval. In June 1979, Cavalieri informed Cole and Fernandez that, as a result of a trustee directive, vacations could only be taken in July or August.

Sanzo testified that the change in vacation policy was based on the trustees' desire to "keep personnel in the office at all times and not have two people out at the same time." Petito and Cavalieri testified that the change in policy was part of the "tightening up process."

12. Respondent closes kitchen facilities

Respondent had a separate kitchen in its office which contained a hotplate, refrigerator, sink, and miscellaneous kitchen equipment. All office employees used this kitchen facility regularly to prepare breakfast, lunches, and snacks. In June 1979, Cavalieri informed Cole and Fernandez that the trustees had ordered the kitchen closed. Thereafter, the refrigerator and hotplate were disconnected and the kitchen was closed. Sanzo testified that the kitchen was closed for economic reasons and to "tighten up" the operation following the "allegations" made by Cole. Sanzo conceded that the closing of the kitchen resulted in a savings of "peanuts." Cavalieri testified that the closing of the kitchen was the direct result of innuendos by Cole. Petito testified that the kitchen was closed as part of the "tightening up process."

13. Sick leave benefits, elimination of coffeebreaks, and check cashing time

Prior to June 20, 1979, Cole and Fernandez did not lose pay when they took sick leave. Moreover, they were permitted to take coffeebreaks or time off to cash paychecks during the workday without being docked for the time taken off.

On June 19, Cole and Fernandez left work at 1:30 p.m., leaving a note for Sanzo and Petito explaining that they were going to the National Labor Relations Board to file charges. On June 19 Cole filed charges in Case 2-CA-16528. On June 20, Sanzo in the presence of Petito asked Cole and Fernandez if they had been to the Labor Board. Cole answered that she had and that she had filed a charge. Petito stated that henceforth Cole and Fernandez would not be paid for any time they were out of the office and this included sick time, lunchtime, and time to cash paychecks as well as time to go to the National Labor Relations Board to file charges.

On June 21, 1979, Cole had occasion to take an hour's sick leave. Respondent deducted the hour's sick leave taken by Cole from her paycheck that week. In September 1979, Fernandez had occasion to take 1 day's sick leave. A full day's pay was deducted from Fernandez' paycheck that week.

Sanzo and Petito testified that Respondent changed its sick leave policy to provide that employees would no longer be paid for the first sick day because of King's position that such policy was more appropriate. However, Petito's testimony in this connection is contradicted by his testimony in Federal District Court (78 Civil 4619) where he testified that the reason for the change in sick leave was the "allegations and innuendos" by Cole and Fernandez.

Moreover, King again credibly testified that the only reason for the change in sick leave policy was "the allegations" by Cole and Fernandez.[15]

Following their June 20 conversation with Sanzo and Petito, Cole and Fernandez took their coffeebreaks at their desks while they worked. Also following the June 20 conversation, Cole and Fernandez generally cashed their checks outside of normal working hours. On several occasions when they did cash their paychecks during working hours, they were not docked for the worktime they missed.

H. *The Decision To Subcontract out the Work of Cole and Fernandez*

As of March 1978, Respondent had fiduciary liability insurance through Lloyds of London.[16] Sometime on or about March or April 1978, Respondent trustees applied to Lloyds of London for a renewal of their fiduciary liability insurance which was due to expire at or about that time. Such renewal was handled through the Professional Indemnity Agency, a subsidary of Tolley, and the exclusive agent for Lloyds of London. Sometime in the March-April 1978 period, Professional Indemnity notified Sol Taber of Tolley that Lloyds of London would not renew the fiduciary liability insurance. Taber testified that Professional Indemnity informed him that the reason Lloyds would not renew the policy was that Respondent's administrative expenses were too high in proportion to the contributions to the funds, and that the administrator of the funds, Cavalieri, was also a fund trustee. This in the opinion of Lloyds raised a conflict of interest. Taber testified that Professional Indemnity was not informed by Lloyds by how much the administrative expenses exceeded the rate required by Lloyds. At a Respondent's trustee meeting in or about March or April 1978, Taber informed Respondent's trustee officials about the report he had received from Professional Indemnity concerning Lloyds' refusal to renew the fiduciary liabili-

[14] As set forth above, I found King to be generally a credible witness.

[15] As set forth above, I found King to be a generally credible witness.

[16] Fiduciary liability insurance is insurance that covers the trustees for liability resulting through their actions in connection with the trust.

ty policy. As a result of Taber's report to Respondent's trustees, Cavalieri voluntarily resigned his position as trustee but retained his position as administrator.

Shortly thereafter, Respondent obtained similar fiduciary liability insurance coverage through Aetna Insurance Co. There is no evidence that Aetna questioned Respondent's administrative expenses before issuing such insurance. There is also no evidence that administrative expenses were reduced at this time.

Tolley Associates performs actuarial work for various trust funds, hospital plans, etc., throughout the United States. In addition, they perform, as an additional service, administrative services which include bookkeeping, financial recordkeeping, preparation of checks, etc.

Tolley has performed actuarial work for Respondent for a period of over 15 years. Prior to December 1, 1979, Tolley performed no administrative work for Respondent.

The first time the subject of subcontracting out the work being performed by Cole and Fernandez for Respondent came up was at a trustee meeting on June 1, 1979. During this meeting Respondent's trustees asked Taber to prepare a proposal for the cost of furnishing administrative services (bookkeeping services, typing services, etc., presently being performed by Cole and Fernandez). Taber testified that the reason given at the meeting by the trustees for consideration of such subcontract was to reduce their administrative expenses and "there were other problems the trustees were encountering." When pressed as to whether the trustees had described what such "other problems" were, Taber testified that the trustees had informed him that these "problems" related to various allegations concerning Respondent by Cole.

King, in his usual blunt manner, credibly testified that the subject of subcontracting the work performed by Cole and Fernandez to Tolley was first discussed at the June 1 trustee meeting. King testified that, as a result of the "allegations and innuendos" brought to his attention by Hirsch and others (presumably Sanzo, Cavalieri, and Petito who were present at the June 1 trustee meeting), Respondent considered terminating Cole and Fernandez and replacing them with Tolley. When King was asked whether Respondent had considered other ways of handling the "allegations and innuendos" like talking to Cole and Fernandez, he responded, "That wasn't a consideration at that point. The consideration at that point was getting rid of them."

Both Petito and Sanzo testified that the only reason for the subcontracting of the administrative work to Tolley was as a means of reducing administrative expenses which had been found by Lloyds of London to be too high. In this connection Petito and Sanzo testified that in addition to considering a subcontract arrangement with Tolley, which would hopefully reduce the cost of administration, the position of assistant administrator which was a paid Respondent position was eliminated. However, according to both Petito and Sanzo, the elimination of the position of assistant administrator and the subcontract arrangement eventually consumated were the only steps taken by Respondent to reduce administrative expenses.

Sometime following the June 1 trustee meeting and prior to November 30, 1979, Taber prepared a written proposal for the performance of all administrative operations for Respondent's pension and welfare funds. The proposed cost for performing such service was $28,500 per year. Such proposal included no proposed services for the vacation fund or the Union.

The total cost of Cole and Fernandez to Respondent including their salaries, social security, unemployment insurance, and fringe benefits totaled $38,500 per year.

Tolley's proposal as submitted by Taber was next discussed by Respondent at a trustee meeting on November 2, 1979, at which time Taber explained that his proposal would in fact include all administrative work presently being performed by Cole and Fernandez, including all bookkeeping and secretarial work for the Union and the vacation fund as well as all bookkeeping and secretarial work for the pension and welfare fund.

It was decided by Respondent's trustees at this meeting to accept Taber's proposal and to replace Cole and Fernandez at the end of the month. Thereafter, all the work performed by Cole and Fernandez would be performed by Tolley.

Respondent does not contend that either Cole or Fernandez was replaced because they lacked the competence to perform the work. On the contrary, Cavalieri described Fernandez as "a very capable woman." Cole was described as "a very competent bookkeeper who was rather quick."

On November 30, 1979, both Cole and Fernandez reported to work as usual. Around 4:30 p.m. that day, Sanzo went to Cole's office and handed her an envelope. He informed her at this time that Tolley was taking her job and that she was terminated. Sanzo then went to Fernandez' office and informed her that her services were no longer required. Letters were given to both Cole and Fernandez advising them that "[t]he services heretofore performed by you have been contracted out to an independent contracting corporation commencing December 1, 1979." And that they were terminated as of November 30, 1979.

Cole testified that, following her notification by Sanzo of her termination and replacement by Tolley, she asked Sanzo if he, Sanzo, had anything to do with their replacement and Sanzo replied, "No, that's not my style. It was Mr. Petito and Mr. Cavalieri's doing. They wanted you out of here."

During the year 1979, Respondent increased the fees paid to Tolley for their actuarial services, Corcoran & Brady for their legal services, and Walter Hirsch for his accounting services. Moreover, as of September 1979, Cavalieri's salary was increased by $50 per week. Additionally, Respondent increased its pension benefits to pensioners effective July 1, 1979, and welfare benefits payable to members effective April 26 and July 1, 1979.

Aside from the reduction of expenses achieved by subcontracting out the work of Cole and Fernandez to Tolley, the only other reduction of expenses was the elimination of the position of assistant administrator on September 29, 1979, held by Petito. When he was assistant administrator, Petito earned $325 weekly from the

funds and $300 per month from the Union. At the time of the instant hearing he was earning $554 weekly as secretary-treasurer of the Union. When Petito was asked whether Respondent considered other ways of saving administrative expenses, Petito replied, "They didn't present it to me. I can't remember any."

II. ANALYSIS

A. *Jurisdiction*

Respondent contends that the Board should not assert jurisdiction because the dispute is essentially local in nature and because the services rendered by Respondent to the employer-members are really services rendered by the Union.

The Board held in *Chain Service Restaurant, Lucheonette & Soda Fountain Employees, Local 11, AFL-CIO*, 132 NLRB 960 (1961), that where a fund formed as in the instant case, pursuant to collective-bargaining agreements between employers and the union, and pursuant to a declaration of trust, furnished services valued in excess of $50,000 to employers who met the Board's jurisdictional standards, such fund was engaged in commerce within the meaning of the Act. In *Chain Service Restaurant, supra*, the Board held that employer contributions to such fund constitute payments for services rendered by the fund to such employers; such services consisting of furnishing pension and health benefits, etc., to employees employed by such employers pursuant to their collective-bargaining agreement with the Union. The fund argued that it did not directly furnish such benefits but rather procured insurance policies for such benefits from various independent insurance companies. The Board, nevertheless, concluded that such subcontracting arrangements did not affect the essential nature of the relationship between the fund and the employers.

In the instant case Respondent admits that it annually provides services valued in excess of $50,000 in the form of pension, welfare, and vacation benefits to employees employed by employers engaged in commerce within the meaning of the Act and with whom the Union has a collective-bargaining agreement which provides for such benefits. Moreover, in the instant case, unlike as in *Chain Service Restaurant*, Respondent is a self-insurer.

Accordingly, I conclude that Respondent is an employer engaged in commerce within the meaning of the Act and that the Board has jurisdiction over Respondent Fund. See also *Joint Industry Board of the Electrical Industry and Pension Committee, et al.*, 238 NLRB 1398 (1978); *Laborers Training*, JD-(SF)-261-77.[17]

B. *Single-Employer Relationship*

The Supreme Court held in *Radio & Television Broadcast Technicians Local Union 1264, IBEW* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965), that in determining whether enterprises constitute a single employer: "The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership." The Board in *Blumenfeld Theatres Circuit, a Partnership; Blumenfeld Enterprises, a Division of Cinerama, Inc.; Roxie Oakland Theatre, a Partnership*, 240 NLRB 206, 214, 215 (1979), held that "single employer status for purposes of the National Labor Relations Act depends upon all the circumstances of the case, that not all of the 'controlling criteria' specified by the Supreme Court (in *Radio and Television Broadcast Technicians*) need be present . . ." In *Eagle Material Handling of New Jersey*, 227 NLRB 174 (1976), the Board held that the decisive inquiry in determining whether a single-employer relationship existed was whether the relationship between Eagle and Somerset was such that they functioned to a substantial degree as a single enterprise. The two companies in that case had common directors and officers, the principal place of business of both was the same building, the employees of both companies received some of the same employee benefits, and there was cooperation between the employees of the two companies. The Board concluded in *Eagle Material Handling* that, under these circumstances, a single-employer relationship had been established. See also *A & T Glass Company, Inc., and A & T Auto Radiator, Inc.*, 231 NLRB 998, 1002 (1977); *North Dade Hospital, Inc. and Arnold A. Oper, d/b/a North Dade Medical Center*, 210 NLRB 588 (1974).

In the instant case, there is common management. Louis Sanzo is Respondent Union's trustee as well as the president of the Union. There can be no doubt in this case as in other similar funds that the union trustee is the dominating official of the fund. Such fund in a sense is an extension of the Union, providing the benefits the Union has been successful in acquiring through collective bargaining on behalf of employees covered by collective-bargaining agreements between the employers and the Union. Moreover, the Employer trustee King is a member of over 30 such funds. His interest in the day-to-day operation of Respondent cannot nearly be that of Sanzo. Sanzo is both the dominant officer in the Union as well as in Respondent. Moreover, the evidence establishes that Sanzo and Cavalieri, Respondent's administrator and alternate union official, are in overall charge of Respondent's office and that all employees are directly responsible to Sanzo. Cavalieri, the administrator, is second in command. The evidence thus establishes common management as between Respondent and the Union. The evidence also establishes, as between Respondent and the Union, a centralized control of labor relations. Cole, Fernandez, and Mitchell were not represented by any labor organization. Control over their wages, hours, and other working conditions is essentially vested in Sanzo and Petito, the Union's trustees. While it may be true that an employee on Respondent's payroll would require approval by both the Union's and Employer's trustees for an increase in wages or other benefits, I find in view of Sanzo's and Petito's daily presence in Respondent's office and their dominance in running the day-to-day operation of the office that the Employer's trustees would rely almost exclusively on Sanzo's or Petito's recommendation with respect to employee bene-

[17] As set forth above, Respondent herein has conceded jurisdiction in a matter now presently pending before the Board. See *Welfare, Pension and Vacation Funds, Blasters, Drillrunners and Miners Union Local No. 29 and their Trustees*, JD-864-79.

fits requiring approval of the trustees. The same is undoubtedly true with respect to an employee on the Union's payroll. With respect to routine benefits not requiring the Union's or Respondent's fund approval, such benefits, whether for employees technically on the Union's payroll or on Respondent's payroll would be granted routinely by Sanzo, Petito, or Cavalieri. Under these circumstances, I find that there exists between the Union and Respondent a centralized control of labor relations.

I also conclude that the Union and Respondent are closely interrelated operations. As set forth above, it can be said that Respondent is merely an extension of the Union. Its existence is to perpetuate and administer those benefits achieved by the Union on behalf of employees that it represents through collective-bargaining agreements with employers. Respondent exists solely for the purpose of administering such benefits. Moreover, the operations of both the Union and Respondent are conducted in the same building utilizing the same employees. There is no dispute that employees Mitchell, Cole, and Fernandez performed all bookkeeping and clerical operations for both the Union and Respondent and were supervised in these operations by Sanzo, Petito, and Cavalieri. The evidence also establishes that, whether a particular employee was on Respondent's or the Union's payroll, the amount of their salary was purely arbitrary. In this connection, neither Cole nor Fernandez was on the Union's payroll until May 30, 1979, although throughout their employment they performed work for the Union.

I therefore conclude that, in view of the common management, the centralized control of labor relations, the interrelation of operations including the fact that the place of business of both Respondent and the Union is in the same building and that the employees on both payrolls work in the same building performing interchangeably the work for both Respondent and the Union, Respondent and the Union constitute a single employer.

C. *Protected Concerted Activities*

The Board held in *Painter Tool, Inc.*, 235 NLRB 1468, 1472 (1978), that an employee's participation as a witness in an unemployment compensation hearing is protected activity and that discharge by an employer for such participation is a violation of Section 8(a)(1) of the Act.

The Board held in *Hunt Tool Company*, 192 NLRB 145 (1971), that Respondent did not violate Section 8(a)(1) by discharging an employee because the employee filed a lawsuit seeking damages under the Longshoremens' and Harbor Workers' Compensation Act for alleged on-the-job injury. Thus, under *Hunt Tool Company*, it was questionable whether participation as a witness in a workmen's compensation hearing was a protected activity. However, the Board overruled *Hunt Tool Company* in *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979), where it concluded that workmen's compensation benefits arise out of the employment relationship and are of common interest to other employees, and therefore an employee pursuing a claim under a workmen's compensation law is engaged in protected activity.[18]

Combining the rationale set forth in *Painter* with the rationale set forth in *Krispy Kreme, supra*, I conclude that an employee's participation as a witness in connection with a workmen's compensation case filed by another individual constitutes protected concerted activity within the meaning of the Act, and that the discharge, or discrimination of an employee for appearing as a witness on behalf of an individual filing a workmen's compensation claim, violates Section 8(a)(1) of the Act.

The Board has consistently held that the discharge of, or discrimination against, an employee for his participation in National Labor Relations Board proceedings, including filing unfair labor practice charges, testifying in connection with representation, or unfair labor practice, proceedings, constitutes a violation of Section 8(a)(1) and (4) of the Act. *Seligman & Associates Inc.*, 240 NLRB 110 (1979); *Fry Foods Inc.*, 241 NLRB 76 (1979); *Pinter Bros., Inc.*, 227 NLRB 921 (1977); *Maspeth Trucking Service, Inc.*, 240 NLRB 1225 (1979); *Pierce Governor Company, Division of Avis Industrial Corporation*, 243 NLRB 1009 (1979).

I therefore conclude that Cole and Fernandez were engaged in protected concerted activities when they testified on behalf of Montouro in the workmen's compensation hearing, and that Cole was engaged in protected activity when she participated in connection with the National Labor Relations Board investigation concerning the unfair labor practice charge filed by Montouro and subsequently testified to in connection with the hearing resulting from the complaint which issued on such charge, and that both Cole and Fernandez were engaged in protected activity on June 19, 1979, and thereafter when they filed unfair labor practice charges with the National Labor Relations Board in connection with the instant case.

D. *Alleged Discriminatory Actions of Respondent Directed Against Cole and Fernandez Excluding Their Discharge*

The Board held recently in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), that henceforth in all cases alleging unlawful discrimination it shall be required "that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." Pursuant to the rationale set forth in *Wright Line, supra*, I shall first consider whether the General Counsel has made a *prima facie* showing sufficient to support the inference that the protected activities of Cole and Fernandez described above were a motivating factor in the alleged discrimination described below.

[18] The Fourth Circuit denied enforcement concluding that pursuing a workmen's compensation claim was not a "concerted" activity. *Krispy Kreme Doughnut Corp. v. N.L.R.B.*, 635 F.2d 304 (4th Cir. 1980).

The General Counsel has clearly established Respondent's animus in connection with all of the protected concerted activities engaged in by Cole and Fernandez described above. Respondent's animus is demonstrated by Sanzo's and Petito's threats of discharge to Cole and Fernandez on October 4, prior to Cole's testimony at the workmen's compensation hearing. Respondent's animus is further demonstrated by Sanzo's criticism directed to Cole on November 15, at the workmen's compensation hearing, that she had not testified truthfully at the workmen's compensation hearing on October 4.

Respondent's animus is further evidenced by the testimony of both Cole and Fernandez at the workmen's compensation hearing held on October 4 and November 15. Their testimony amounted to virtual admissions by Sanzo and Petito that Montouro had been discharged from his position with Respondent because he had filed a workmen's compensation claim. Such testimony in my opinion could not help but result in animus by Sanzo and Petito toward Cole and Fernandez, employees with whom they had enjoyed a particularly close relationship and with whom they had confided as to the reason for Montouro's discharge. The natural effect of such testimony on Sanzo and Petito would be that they would feel betrayed by trusted employees, and such feelings of betrayal would naturally result in intense animus toward Cole and Fernandez.

Respondent's animus directed toward Cole is further evidenced by her participation in the investigation and testimony in connection with the National Labor Relations Board charge against Respondent filed by Montouro. In this connection, Cole informed Sanzo on October 25, 1978, that she had supplied the Board agent investigating Montouro's charge with an affidavit concerning the events surrounding his discharge. In view of Cole's testimony before the Workmen's Compensation Board on October 4, Sanzo must have had a good idea as to the content of Cole's National Labor Relations Board affidavit. Moreover, during the National Labor Relations Board hearing in connection with Montouro's charge held on May 4, 1979, Cole testified as to the animus by Sanzo and Petito toward Montouro and as to the facts surrounding his discharge. Such testimony contradicted that of Sanzo. For the same reasons set forth in connection with my discussion concerning the animus of Respondent resulting from Cole's and Fernandez' testimony before the Workmen's Compensation Board, additional animus toward Cole as a result of her participation and testimony in connection with the National Labor Relations Board proceeding filed by Montouro would be expected.[19]

Respondent's animus toward Cole and Fernandez resulting from their participation in the workmen's compensation case and unfair labor practice case described above is admitted by both King and Petito. In this regard, both Petito and King testified that a number of the alleged discriminatory changes in the employment relationship between Respondent and Cole and Fernandez was the result of a "tightening up" process resulting from the "allegations and innuendos" attributed to Cole and Fernandez. Both King and Petito admitted that among the "allegations and innuendos" which led to such "tightening up" was the participation by Cole and Fernandez in the Workmen's Compensation Board and National Labor Relations Board proceedings which were then pending. Moreover, King admitted that the ultimate decision to subcontract out the work of Cole and Fernandez to Tolley resulted at least in part from such "allegations and innuendos."

Respondent's animus is still further evidenced by Petito's statements to Cole and Fernandez on June 20, upon being informed by Cole and Fernandez that they had left work on June 19 to file the instant charges herein in Case 2-CA-16528 when he stated that henceforth Cole and Fernandez would not be paid for any time they were out of the office and this included sick time, lunchtime, and time to cash paychecks as well as time to go to the National Labor Relations Board to file charges. Such statements, aside from constituting evidence that such changes were discriminatorily motivated, constitute independent evidence of Respondent's animus.

Respondent's animus is still further evidenced by the sudden change in the work relationship between Respondent's officials Petito, Sanzo, and Cavalieri and employees Cole and Fernandez immediately following their participation in the workmen's compensation hearing on October 4. In this connection, Cavalieri testified that the work relationship began to change "more or less with the workmen's compensation case." Further, Mitchell testified that she observed that tension existed in the office when she first became employed in the beginning of December 1978.

E. *The Hiring of Rose Mitchell*

I conclude that the hiring of Rose Mitchell by Respondent is circumstantial evidence in connection with the General Counsel's *prima facie* case that Respondent engaged in the discriminatory conduct directed to Cole and Fernandez alleged in the complaint. In this connection, Rose Mitchell was first employed by Respondent shortly after Cole's and Fernandez' participation in the workmen's compensation hearing. In view of my finding that Respondent and the Union constitute a single employer, that Mitchell was placed on the Union's payroll is irrelevent. There is no conceivable reason, economic or otherwise, which necessitated Mitchell's employ. Her work in the office consisted essentially of answering telephone calls, responding to the door buzzer, recording union dues, and at times mailing out notices of union meetings and occasionally assisting in the redemption of vacation stamps. All of these duties were formerly performed without undue hardship by Cole and Fernandez. There is no evidence whatever that Cole or Fernandez was negligent or incapable of performing their job duties nor is there any evidence that the performance of their required job duties necessitated additional help. To the contrary, the evidence suggests that Cole and Fernandez had been performing all job functions required to maintain the office in a most acceptable manner. Respondent had no complaints about their work nor did Cole and

[19] As noted in the facts above, the Administrative Law Judge in his Decision gave considerable weight to Cole's testimony in reaching his conclusion that Montouro was discharged in violation of the Act.

Fernandez request additional help. Under these circumstances, I conclude that the hiring of Rose Mitchell was for the purpose of enabling Respondent to reduce the job responsibilities of Cole and Fernandez as a prelude to their eventual discharge and subsequent replacement by Tolley.

Based on the intense hostility by Respondent toward Cole and Fernandez as described above and based on the hiring of Rose Mitchell which I conclude was for no other purpose other than to enable Respondent to diminish the work responsibilities of Cole and Fernandez as a prelude for their eventual replacement by Tolley and based on the admissions of King and Petito that changes in the working conditions of Cole and Fernandez resulted from their participation in the workmen's compensation hearing, the National Labor Relations Board hearing, and the filing of the unfair labor practice charges herein, I conclude that the General Counsel has established a *prima facie* showing that their protected activities were a motivating factor in the alleged discriminatory changes in working conditions.

I note that prior to June 20, 1979, Fernandez was not a participant in any National Labor Relations Board proceeding. Therefore any discrimination involving her and taking place prior to June 20, I will attribute entirely to her participation in the workmen's compensation hearing. I will attribute alleged discriminatory conduct occurring on or after June 20 involving Fernandez to her participation in the workmen's compensation hearing and to the unfair labor practice charges filed by Fernandez. With respect to alleged discriminatory conduct, which the evidence indicates took place at an unspecified date in June 1979, I find that the General Counsel has not sustained its burden of establishing that such discriminatory conduct was motivated in part by Fernandez' participation in connection with the National Labor Relations Board charges filed herein.

On the basis of my reasoning described above, I conclude that the General Counsel has established a *prima facie* showing sufficient to support the inference that the protected activities of Cole and Fernandez were a motivating factor in the following discriminatory conduct:

1. Beginning in December 1978, Respondent reduced the job responsibilities of Cole by refusing to allow her to call union members at their homes to inform them of work opportunities.

2. Since on or about December 1978, Respondent reduced the job responsibilities of Cole and Fernandez by refusing to allow them to deal directly with Respondent's accountant or with the bank where Respondent keeps its account.

3. Since December 1978, Respondent reduced the job responsibilities of Cole and Fernandez by refusing to allow them to distribute pension checks to individuals entitled to receive such checks.

4. Since on or about December 1978 or January 1979, Respondent reduced the job responsibilities of Cole and Fernandez by ordering them not to answer the office door or telephone at Respondent's office.[20]

5. Since on or about May 1979, Respondent reduced the job responsibilities of Fernandez by refusing to allow her to obtain from the General Contractors Association its signature on certain documents.

6. Since on or about June 1979, Respondent reduced the job responsibilities of Cole by refusing to allow her to fill out pension and welfare claim forms for members.

7. Since on or about August 1979, Respondent reduced the job responsibilities of Fernandez by refusing to allow her to send letters under her signature to employers who were deficient in their welfare and pension contributions.

8. Since on or about June 1979, Respondent reduced the job responsibilities of Cole and Fernandez by eliminating their duties regarding Respondent's petty cash fund.

With respect to paragraphs 1 through 8, the Board has held that the reduction of job responsibilities without any reduction in pay is unlawful if discriminatorily motivated. *Teleprompter of Tuscaloosa, Inc.*, 233 NLRB 481, 486 (1977).

9. Since on or about June 1979, Respondent harassed and discriminated against Cole and Fernandez by its failure to issue new door keys to Cole and Fernandez.[21]

10. In June 1979, Respondent denied pay raises of $25 per week to Cole and Fernandez.

11. In June 1979, Respondent imposed a restriction upon Cole and Fernandez with respect to their vacations by requiring that vacations be taken only during the months of July and August.

12. Since June 1979, Respondent closed its kitchen facilities located at Respondent's office and denied Cole and Fernandez the use thereof.

13. Since June 20, 1979, Respondent revoked and denied paid sick leave benefits previously enjoyed by Cole and Fernandez and eliminated paid coffeebreaks and paid check cashing time previously enjoyed by Cole and Fernandez.

With respect to paragraphs 9 through 13, the Board has consistently held that such conduct is unlawful if discriminatorily motivated. *Laredo Coca Cola Bottling Co.*, 241 NLRB 167 (1979); *East Towne Chrysler Motors, Inc.*, 238 NLRB 1379 (1978); *Winco Petroleum Company*, 241 NLRB 1118 (1979); *Chemtronics Inc.*, 236 NLRB 978; *Interstate Transport Security*, 240 NLRB 274 (1979); *Downtown Ford Sales*, JD-(SF)-190-79.

Counsel for Respondent contends that, assuming that the conduct set forth in paragraphs 1 through 8 took place, such conduct would not violate the Act since the reduction of job responsibilities took place without a reduction in pay and had the effect of making the jobs of Cole and Fernandez easier. Respondent's counsel argues that, rather than being discriminatory, the reduction in job responsibilities would actually amount to a benefit. I do not find merit in Respondent counsel's contention. It is well established that any change by an employer in the working conditions of an employee, including job re-

[20] That Cole or Fernandez may have on occasion answered the telephone or door buzzer does not diminish in my opinion that Respondent nevertheless discriminatorily reduced their job responsibilities.

[21] Although this allegation was not specifically alleged in the complaint, such allegation was generally encompassed by the complaint. Moreover, the allegation was fully litigated. See *Victor Miceli and Sam Miceli d/b/a Riverside Produce Company*, 242 NLRB 615 (1979); *Gerald G. Gogin d/b/a Gogin Trucking*, 229 NLRB 529 (1977).

sponsibilities, is unlawful if discriminatorily motivated. In this connection, the Board held in *Teleprompter, supra*, that a reduction in job responsibilities, although without a loss in pay, constitutes an unlawful demotion where discriminatorily motivated. In such case, the message is clear, that message being that the employee's services are no longer wanted.

Respondent offers no other defense as to the allegations set forth in paragraphs 1 through 8 except the denials by Respondent. In view of my credibility resolutions discussed in detail above, I have credited the testimony of Cole and Fernandez with respect to all of these allegations. Therefore, I conclude that, with respect to the allegations set forth in paragraphs 1 through 8, Respondent has not met its burden under *Wright Line, supra*, to establish that the alleged discriminatory acts would have taken place in the absence of the protected activities by Cole and Fernandez. I therefore conclude that:

By engaging in the conduct set forth in paragraph 1, Respondent violated Section 8(a)(1) and (4) of the Act as to Cole.

By engaging in the conduct set forth in paragraph 2, Respondent violated Section 8(a)(1) and (4) as to Cole, 8(a)(1) as to Fernandez from December 1978 until June 20, 1979, and thereafter 8(a)(1) and (4) as to Fernandez.

By engaging in the conduct set forth in paragraph 3, Respondent violated Section 8(a)(1) and (4) as to Cole, 8(a)(1) as to Fernandez from December 1978 until June 20, 1979, and thereafter 8(a)(1) and (4) as to Fernandez.

By engaging in the conduct set forth in paragraph 4, Respondent violated Section 8(a)(1) and (4) as to Cole, 8(a)(1) as to Fernandez from December 1978 until June 20, 1979, and thereafter 8(a)(1) and (4) as to Fernandez.

By engaging in the conduct set forth in paragraph 5, Respondent violated Section 8(a)(1) as to Fernandez from May 1979 until June 20, 1979, and thereafter 8(a)(1) and (4) as to Fernandez.

By engaging in the conduct set forth in paragraph 6, Respondent violated Section 8(a)(1) and (4) as to Cole.

By engaging in the conduct set forth in paragraph 7, Respondent violated Section 8(a)(1) and (4) as to Fernandez.

By engaging in the conduct set forth in paragraph 8, Respondent violated Section 8(a)(1) and (4) as to Cole, 8(a)(1) as to Fernandez from June 1979 until June 20, 1979, and thereafter 8(a)(1) and (4) as to Fernandez.

With respect to the conduct set forth in paragraphs 9 through 13, Respondent contends that such conduct took place as a result of the "tightening up" which resulted from the "allegations and innuendos" of Cole and Fernandez. I shall now consider whether Respondent meets the burden of demonstrating that the actions set forth in paragraphs 9 through 13 would have taken place in the absence of the protected activities of Cole and Fernandez.

As set forth above, Respondent's representatives, Petito and King, admit that Respondent took the actions described in paragraphs 9 through 13 as part of a "tightening up process" which resulted from the "allegations and innuendos" by Cole and Fernandez. King and Petito further admit that such allegations and innuendos include the participation of Cole and Fernandez in the workmen's compensation proceeding and the participation of Cole in connection with the unfair labor practice proceeding involving Montouro as well as the filing of the unfair labor practice charges herein by Cole and Fernandez. Respondent, however, contends that despite these admissions the motivating factor behind the action taken was not the participation by Cole and Fernandez in the protected activities described above, but rather the allegations by Cole concerning Sanzo and Petito in connection with the government investigations into Respondent's funds.

At the outset, I find it significant that there is no evidence of any "allegations or innuendos" attributable by Respondent to Fernandez. All of the "allegations and innuendos" were attributed to Cole. Further, the allegations attributed to Cole were essentially directed to Cavalieri and Edelstein, an accountant employed by Walter Hirsch, who served as Respondent's accountant. Respondent contends that the result of the allegations by Cole was to require Hirsch to extend his audit and it was such conduct that motivated the so-called "tightening up." In support of this contention, Walter Hirsch initially testified that he did extend his audit because of the "allegations and innuendos" cast upon the trustees by Cole. Hirsch further testified that he reported to the trustees the need to extend his audit because of such allegations at a special trustees meeting convened on June 1, 1979. However, as set forth above, Hirsch also testified that, prior to the allegations by Cole which did not take place until sometime in April 1979, and at times thereafter, he was aware of the ongoing investigations of Respondent by various government agencies. In this connection, he was aware prior to April 1979 that government agents had taken physical possession of certain of Respondent's books. Hirsch ultimately admitted that it was these government investigations that actually impelled him to extend his audit, rather than any "allegations and innuendos" by Cole. Further, Edelstein testified that he was instructed by Hirsch in January 1979, several months prior to any so-called allegations by Cole, to be very careful in doing every required auditing step and not to leave any steps undone because Respondent was under investigation. On the basis of the testimony of Hirsch and Edelstein, I conclude that any necessity to extend the audit was the result of the knowledge by Hirsch in January 1979 of the ongoing government investigations rather than any "allegations or innuendos" made by Cole in April 1979 or thereafter. Further, simple prudence would dictate to any accountant with knowledge of such government investigations the necessity of a special audit. Moreover, the newspaper stories set forth in the New York Daily News, described above and presumably read by all parties to this proceeding, were far more detailed and inflammatory than any statements attributed by Respondent to Cole.

Respondent also contends that the "allegations and innuendos" by Cole and Fernandez and the sullen attitudes of these employees so offended Respondent that it was justified in taking the actions described in paragraphs 9 through 13. As argued by the General Counsel in his

brief, "it would be ludicrous to conclude that Respondent developed its animus toward Cole and Fernandez not because they gave testimony at state and federal agencies depicting Respondent's agents as liars, scoundrels, and violators of state and federal law but rather because they sullied the reputations of these agents in conversations inside Respondent's office with individuals already familiar with the ongoing government investigations . . . ."

I find it highly significant in connection with Respondent's defense that the pattern of discriminatory conduct engaged in by Respondent which began by diminishing the job responsibilities of both Cole and Fernandez commenced in December 1978 and January 1979 immediately following Cole's and Fernandez' participation in the workmen's compensation hearing. Such discriminatory conduct preceded any "allegations and innuendos" by Cole or any actions by either Cole or Fernandez which could be characterized as insubordinate, sullen, uncooperative, or improper.

I therefore conclude that pursuant to *Wright Line, supra*, Respondent has not met its burden, in that it has failed to demonstrate that the alleged discriminatory action set forth in paragraphs 9 through 13 would have taken place in the absence of the protected conduct. Accordingly, I find that it was the participation by Cole and Fernandez in the workmen's compensation proceeding involving Montouro, the National Labor Relations Board proceeding involving Montouro, and the subsequent filing of the instant unfair labor practice charges by Cole and Fernandez that motivated the discriminatory conduct set forth in paragraphs 9 through 13. I also conclude that, when Respondent's officials referred to the so-called "tightening up process" which resulted from the "allegations and innuendos" by Cole and Fernandez, such phrases were merely code words to express retaliation by Respondent for the protected activities of Cole and Fernandez.

On the basis of the above, I conclude that, by engaging in the conduct set forth in paragraphs 9 through 12, Respondent violated Section 8(a)(1) and (4) as to Cole, 8(a)(1) as to Fernandez from June 1979 until June 20, 1979, and thereafter 8(a)(1) and (4) as to Fernandez. I also conclude that by engaging in the conduct set forth in paragraph 13 Respondent violated Section 8(a)(1) and (4) as to Cole and Fernandez.

F. *The Discharge of Cole and Fernandez*

Applying the *Wright Line* rationale, *supra*, to the instant case I conclude that the General Counsel has established a *prima facie* showing sufficient to support the inference that the protected activity of Cole and Fernandez was a motivating factor in their discharge. In this connection, the General Counsel has established as set forth and discussed above that Respondent harbored intense animus toward Cole and Fernandez because of their protected activities set forth above. This is evidenced by the threat of discharge followed by the pattern of discriminatory conduct engaged in by Respondent which commenced in December 1978 and continued thereafter until the employees' discharge on November 30, 1979. The General Counsel argues convincingly that such unlawful conduct which stripped them of their job responsibilities, made their working conditions more onerous, and eliminated various employee benefits was designed to harass, demean, and force the employees to resign. When such resignation was not forthcoming, Respondent discharged them. Further evidence in support of the General Counsel's *prima facie* case is the admission by King that the discharge of Cole and Fernandez was in part motivated by the "allegations and innuendos." As set forth and discussed above, I have concluded that the phrases constantly used by Respondent's representatives, "tightening up" as a result of the "allegations and innuendos," were merely code words to indicate actions taken in retaliation against Cole and Fernandez because of their protected activities. In this connection, when King was questioned, whether during the June 1 trustees meeting, at which time the possibility of subcontracting out the work of Cole and Fernandez to Tolley was first discussed, Respondent had considered other alternative measures in order to relieve the office problems that existed as a result of the "allegations and innuendos," his response to this question was, "That wasn't a consideration at that point. The consideration at that point was getting rid of them [Cole and Fernandez]." This testimony tends to strongly establish that the motivating factor in replacing Cole and Fernandez with Tolley was the "allegations and innuendos" by Cole and Fernandez which I have concluded to be discriminatory considerations, rather than any economic considerations discussed below. King's admission indicates that as of June 1 the decision had already been made to replace Cole and Fernandez and that the decision was motivated by Respondent's animus resulting from their protected activities.

Additionally, on November 30, when Cole and Fernandez were notified of their discharge and replacement by Tolley, Cole asked Sanzo if he had anything to do with their replacement. Sanzo replied, "No, that's not my style. It was Mr. Petito and Mr. Cavalieri's doing. They wanted you out of here." Such statement, taken together with the admissions of King, further establishes the discriminatory motivation.

Further evidence that the decision to replace Cole and Fernandez was motivated by their protected activities rather than economic considerations is established through the shifting reasons as testified to by Respondent's officials. In this connection, King's testimony that the decision to replace Cole and Fernandez was in part motivated by the "allegations and innuendos" is contradicted by Sanzo and Petito who testified that the only reason for replacing Cole and Fernandez with Tolley was to "save money." The Board has consistently held that, where a respondent has offered shifting or contradictory reasons for discharge, this is evidence of a discriminatory motive. *Taft Broadcasting Company*, 238 NLRB 588 (1978); *PRS Limited, d/b/a F. & M. Importing Co.*, 237 NLRB 620 (1978); *Grede Foundries, Inc.*, 211 NLRB 710, 711 (1974).

Respondent's counsel contends that the replacement of Cole and Fernandez was economically motivated. In support of this defense, the testimony of Taber and other Respondent officials establishes that, in March 1978, Respondent was informed by Taber that Lloyds of London

would not renew the fiduciary insurance coverage because Respondent's administrative expenses were too high and Cavalieri's position with Respondent and the Union represented a conflict of interest. The evidence also establishes, however, that, prior to effecting any reduction in administrative expenses, Respondent was able to procure similar insurance from Aetna. There is no evidence whatsoever that Aetna suggested that Respondent's administrative expenses were too high before it issued its policy. Accordingly as of June 1979, when the trustees met and considered the replacement of Cole and Fernandez with Tolley, there was no pressing need to reduce Respondent's administrative expenses.

Respondent contends that, by replacing Cole and Fernandez with Tolley, a savings of $10,000 was achieved. The annual fee charged by Tolley to Respondent for performance of the same services performed by Cole and Fernandez is $28,500 per year. The total cost of the same service provided by Cole and Fernandez, including their salaries, social security, unemployment insurance, and fringe benefits totaled $38,500 per year. All other things being equal, this would amount to a saving of approximately $10,000 per year. However, during this period, Respondent hired Rose Mitchell at an annual expense of approximately $10,500 per year. While it is true that Rose Mitchell was placed on the union payroll rather than Respondent's fund payroll, I have concluded, as set forth and discussed above, that Respondent and the Union constitute a single employer. I have also concluded that there was no necessity in the hiring of Rose Mitchell, other than to have her available to perform job duties that were discriminatorily taken away from Cole and Fernandez. The evidence establishes that Cole and Fernandez performed that work presently being performed by Tolley and Mitchell. Therefore, the net savings Respondent achieved by replacing Cole and Fernandez with Tolley and Mitchell is zero. I therefore conclude that the replacement of Cole and Fernandez by Tolley did not result in any economic savings by Respondent.

Even if it were ultimately concluded that Respondent and the Union were not a single employer, the savings achieved by replacing Cole and Fernandez with Tolley would only be approximately 5 percent.[22]

Moreover, it would appear that had Respondent wanted to reduce administrative expenses of its funds it could have done so without replacing Cole and Fernandez. This could have been accomplished by arbitrarily charging the Union more than the $100 per week presently being charged. That Respondent could do this is evidenced by the fact that from the beginning of their employ until June 1979 the Union was never charged at all for their services. Another possible solution would have been to place either Cole or Fernandez on the Union's payroll as Mitchell was placed on the Union's payroll. This would have resulted in a savings of over $19,000, a far greater savings than achieved by replacing Cole and Fernandez with Tolley.

[22] Respondent's fund administrative expenses for the year 1978 totaled approximately $195,000. Accordingly, a savings of $10,000 would amount to approximately a 5-percent total savings in administrative expenses.

Further, although Respondent contends the replacement of Cole and Fernandez by Tolley was for economic reasons, it is significant that other than the replacement of Cole and Fernandez by Tolley, and the elimination of the position of assistant administrator, which resulted in a minimal savings, no other economic measures were taken by Respondent to reduce administrative expenses. On the contrary, at a time when Respondent replaced Cole and Fernandez, they increased the annual fee paid for the services of Tolley, their attorneys, and their accountant, Hirsch. In addition, benefits to employees were also increased.

The validity of Respondent's economic defense is further diminished sharply if not entirely by the admissions of King that as of June 1 Respondent had decided to "get rid of" Cole and Fernandez because of the "allegations and innuendos" and the admission by Sanzo that Cavalieri and Petito wanted them out. Respondent's economic defense is still further diminished by the shifting reasons for the replacement of Cole and Fernandez described above.

Applying the principles of *Wright Line, supra*, to Respondent's defense, I conclude that Respondent has failed to meet its burden in that it has failed to establish that the replacement of Cole and Fernandez by Tolley was motivated by economic considerations. Accordingly, it is my conclusion that Cole and Fernandez were discharged by Respondent for engaging in the protected activities described above and that such discharge violates Section 8(a)(1) and (4) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent and the Union constitute a single employer within the meaning of the Act.

4. Cole and Fernandez engaged in protected concerted activities within the meaning of the Act when they appeared and testified as witnesses in a workmen's compensation proceeding involving Montouro, when Cole appeared and testified in a National Labor Relations Board proceeding in connection with an unfair labor practice charge filed by Montouro, and when Cole and Fernandez filed unfair labor practice charges against Respondent in the instant case.

5. Respondent, by reducing the job responsibilities of Cole and Fernandez, denying pay raises to Cole and Fernandez, reducing benefits and imposing more onerous working conditions upon Cole and Fernandez as described in the "Analysis" section herein, because said employees engaged in the protected concerted activities described in paragraph 4 above, violated Section 8(a)(1) and (4) of the Act.

6. Respondent by discharging Cole and Fernandez because they engaged in the protected concerted activities described above in paragraph 4 violated Section 8(a)(1) and (4) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (4) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act. My recommended Order will require Respondent to offer Joyce Cole and Julieta Fernandez reinstatement to their former positions of employment, or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges. In addition, Respondent shall make Cole and Fernandez whole for any loss of earnings they have suffered or may suffer by reason of the unlawful discrimination or refusal to reinstate them, by paying to them a sum of money equal to the amount they normally would have earned from the date of their unlawful discharge until the date Respondent offers them reinstatement, computed in the manner set forth by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), together with interest thereon as computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977); see, generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Payroll and other records in possession of Respondent are to be made available to the Board or its agents to assist in such computation. Additionally, Respondent will be required to restore to Cole and Fernandez, (a) those job responsibilities previously part of their normal employment and discriminatorily eliminated as set forth above in the analysis section herein, and as set forth below in the recommended Order, (b) to restore those job benefits eliminated or reduced by Respondent and to eliminate those working conditions which were more onerous as a result of the discrimination herein, described above in the "Analysis" section, and set forth below in the recommended Order, and (c) to grant Cole and Fernandez a $25-per-week raise that Respondent discriminatorily denied each employee. Additionally, Respondent will reimburse Cole 1 hour's sick leave discriminatorily deducted from her pay on June 21, and will reimburse Fernandez 1 day's pay for sick leave discriminatorily deducted from her pay in September 1979, with interest computed as set forth above.

Upon the foregoing findings of fact, analysis, and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[23]

The Respondent, Welfare, Pension and Vacation Funds, Blasters, Drillrunners and Miners Union Local No. 29 and their trustees, Louis Sanzo, Amadio A. Petito, Patricia Cahill, and Theodore King, New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Reducing the job responsibilities of employees by refusing to allow them to call employees represented by the Blasters, Drillrunners and Miners Union Local No. 29, of the Laborers' International Union of North America, AFL-CIO, herein called the Union, at their homes to inform them of work opportunities.

(b) Reducing the job responsibilities of employees by refusing to allow them to deal directly with Respondent's accountant or with the bank where Respondent's fund keeps its accounts.

(c) Reducing the job responsibilities of employees by refusing to allow them to distribute pension checks to individuals entitled to receive such checks.

(d) Reducing the job responsibilities of employees by ordering them not to answer the office door or telephone at Respondent's office.

(e) Reducing the job responsibilities of employees by refusing to allow them to obtain from the General Contractors' Association its signature on certain documents.

(f) Reducing the job responsibilities of employees by refusing to allow them to fill out pension and welfare claim forms for employees represented by the Union.

(g) Reducing the job responsibilities of employees by refusing to allow them to send letters to employers under their signatures, who are deficient in their welfare and pension contributions.

(h) Reducing the job responsibilities of employees by eliminating their duties regarding Respondent's petty cash fund.

(i) Reducing employment benefits and making working conditions more onerous by refusing to furnish employees with the key to Respondent's office.

(j) Reducing employment benefits and making working conditions more onerous by imposing a restriction upon employees with respect to their vacations, by requiring that they take vacation only during the months of July and August.

(k) Reducing employment benefits and making working conditions more onerous by closing the kitchen facilities of Respondent's office and denying employees the use thereof.

(l) Reducing employment benefits and making working conditions more onerous by revoking and denying paid sick leave benefits previously enjoyed by employees.

(m) Reducing employment benefits and making working conditions more onerous by eliminating paid coffeebreaks and paid check-cashing time previously enjoyed by employees.

(n) Denying pay raises promised to employees.

(o) Discharging or otherwise discriminating against employees for engaging in protected concerted activities.

(p) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which I find is necessary to effectuate the policies of the Act:

[23] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order, herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections shall be deemed waived for all purposes.

(a) Offer to Joyce Cole and Julieta Fernandez immediate and full reinstatement to their former jobs, and, if they no longer exist, to substantially equivalent employment and make Cole and Fernandez whole for any loss of pay they may have suffered as a result of the unlawful discrimination practiced against them in the manner set forth in the section of this Decision entitled "The Remedy." In addition, such backpay shall include an annual salary increase of $25 per week promised to Cole and Fernandez.

(b) Pay to Cole 1 hour's sick pay in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Pay to Fernandez 1 day's sick pay in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Restore to the job responsibilities of Cole the duty of calling union members at their homes to inform them of work opportunities.

(e) Restore to the job responsibilities of Cole and Fernandez the duty to allow them to deal directly with Respondent's accountant or with the bank where Respondent Funds keeps its accounts.

(f) Restore to the job responsibilities of Cole and Fernandez the duty of allowing them to distribute pension checks to individuals entitled to receive such checks.

(g) Restore to the job responsibilities of Cole and Fernandez the duty of answering the office door and the telephone at Respondent's office.

(h) Restore to the job responsibilities of Fernandez the duty of allowing her to obtain from the General Contractors Association its signature on certain documents.

(i) Restore to the job responsibilities of Cole the duty of allowing her to fill out pension and welfare claim forms for members.

(j) Restore to the job responsibilities of Fernandez the duty of allowing her to send letters to employers under her signature, who are deficient in their welfare and pension contributions.

(k) Restore to the job responsibilities of Cole and Fernandez their duties regarding Respondent's petty cash fund.

(l) Furnish to Cole and Fernandez keys to Respondent's office.

(m) Restore the vacation policy followed with respect to Cole and Fernandez prior to June 1979.

(n) Reopen Respondent's kitchen facilities and permit Cole and Fernandez the use thereof.

(o) Reinstate the paid sick leave policy in effect prior to on or about June 20, 1979.

(p) Reinstate paid coffeebreaks and paid check-cashing time procedures previously enjoyed by Cole and Fernandez prior to June 20, 1979.

(q) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(r) Post at its office, located at 283 East 75th Street, New York, New York, copies of the attached notice marked "Appendix."[24] Copies of said notice, on forms privided by the Regional Director for Region 2, after being signed by Respondent authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(s) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[24] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."